

BEFORE THE DOCKET FILE COPY ORIGINAL RECEIVED

Federal Communications Commission JUN 29 1994

WASHINGTON, D. C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Section 19)
of the Cable Television)
Consumer Protection and)
Competition Act of 1992)
)
)
Annual Assessment of the)
Status of Competition in the)
Market for the Delivery of)
Video Programming)

CS Docket No. 94-48

To: The Commission

COMMENTS OF HOME BOX OFFICE

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SUMMARY

Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") to promote competition in multichannel video programming distribution. Congress sought to foster such competition by encouraging the development of multichannel video programming distributors that could compete with cable operators, and by ensuring that the competitors have access to popular programming. The Commission initiated this Notice to examine the state of competition and to determine whether the 1992 Cable Act is effectively carrying out the Congressional intent.

HBO believes that competition and program access have been developing since long before the 1992 Cable Act's program access provisions were enacted. The large number of competing distribution technologies currently available, and the ability of these distribution systems to gain access to the top cable programming, clearly demonstrates that competition among multichannel video program distributors is robust. Moreover, all indications suggest that such competition will increase even more rapidly in the future as new distribution technologies emerge.

New technologies such as video compression and improved encryption systems are playing an important role in fostering new distribution alternatives.

HBO and other programming vendors have benefitted from the increased numbers of distribution technologies. Through these

competitors, HBO has been able to widely distribute its services and obtain many new subscribers. HBO has found that increased competition among video programming distributors has improved the penetration of HBO services in the marketplace. HBO and other video programming vendors, therefore, are encouraged to distribute their programming through as many technologies and as many viable distributors as possible.

Because of jurisdictional limitations, the Commission should refrain from imposing periodic information collection requirements on video programmers. If the Commission nevertheless adopts such requirements, it should ensure the confidentiality of any sensitive business and proprietary information that programmers might be required to submit.

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COMMENTS OF HOME BOX OFFICE

Home Box Office, a Division of Time Warner Entertainment Company, L.P. ("HBO"), by its attorneys, hereby submits these comments in response to the Commission's Notice of Inquiry in the above captioned proceeding.¹ HBO's comments will demonstrate that competition among multichannel video programming distributors is robust due to the entry and development of numerous competitors to cable television operators.

¹ In the Matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry, CS Docket No. 94-48, FCC 94-119 (rel. May 19, 1994) ("Notice").

I. INTRODUCTION/INTEREST OF HBO

Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") to foster competition in the cable television industry. One of the major objectives of the 1992 Cable Act was to encourage the development of wireless cable and other "multichannel video programming distributors" that would compete with cable operators, and to ensure that these competitors had access to popular programming.² In order to monitor the effectiveness of the 1992 Cable Act and the "program access" provisions, Section 19(g), 47 U.S.C. § 548(g), directs the Commission to report to Congress annually on "the status of competition in the market for the delivery of video programming." Accordingly, the Commission initiated this Notice to assist in gathering the information necessary to comply with this statutory requirement.

HBO, as the owner of HBO and Cinemax, is a leading supplier of premium video entertainment. HBO's services currently are transmitted via satellite direct to home and to commercial affiliates that in turn utilize various methods of local video distribution, such as cable television, satellite master antenna systems ("SMATV") and multichannel multipoint distribution service ("MMDS" or "wireless cable"). HBO competes nationally with other programming distributed by multichannel distributors, over-the-air broadcasters and videocassette distributors. It is from this national perspective that HBO considers the emergence of new

² See Section 19 of the 1992 Cable Act, 47 U.S.C. § 548.

distribution technologies and the expansion of outlets for its programming and that of its competitors. These new distributors can obtain access to programming, including HBO services, without difficulty.

Based on its experience in video programming distribution, HBO believes that the objectives of the 1992 Cable Act's program access provisions were well on their way to fulfillment long before the 1992 Cable Act was adopted, as evidenced by the large number of competing distribution technologies then available and the ability of these distribution systems to gain access to the most popular cable programming. The trend toward competitive distribution technologies, and their ready access to programming, has continued for the past several years.

In the remainder of these comments, HBO will discuss the many different multichannel video programming distributors that are, or soon will be, competing with cable operators. HBO then will discuss the ease with which these competitors have access to programming under HBO's control.

II. COMPETITION AMONG MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTORS IS ROBUST

A. Competitors to Cable Television

Competition among multichannel video programming technologies is evidenced by the existence of several active competitors and the emergence and development of numerous new competitive technologies. Such competitors include wireless cable, three types of direct-to-home ("DTH") satellite service technologies

(C-Band, medium-power Ku-Band and high-power DBS), SMATV, local telephone exchange carriers ("LECs"), cable overbuilds, and over-the-air television. Most of these competitors pre-date the 1992 Cable Act, and they, and other newer competitors (e.g., medium-power Ku-Band satellite services), have shown expansive growth since the enactment of the 1992 Cable Act.

1. Wireless Cable

a. MMDS

Wireless cable is currently one of the largest terrestrial based multichannel competitors to traditional cable television in the video programming distribution business. Wireless cable has boasted steady and increased growth, and all indications suggest that this growth will continue into the future. In the FCC's 1990 report on competition in the provision of cable television services, the FCC noted that there were 50 or more wireless cable systems serving approximately 300,000 subscribers across the country. See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 4962 (1990) (Report). By the end of 1993, wireless cable was serving approximately 500,000 subscribers.³ It is further anticipated that by the year 2000, wireless cable will be

³ Andrew Kreig, "Wireless Cable '94 Service Predicted in 23 of 25 Top ADI TV Markets," Spectrum, at 1. HBO believes that wireless cable services could have grown even more rapidly had the FCC been able to accelerate its licensing and regulatory process for the various wireless cable technologies.

serving more than 4 million subscribers and generating approximately \$2 billion in annual revenues.⁴

To date, wireless cable systems are in operation in almost all of the nation's top 25 television markets and are dispersed throughout the country in a variety of medium and small markets. The heaviest concentrations of wireless systems are in the Midwest.⁵ Based on its research, HBO believes that the total potential homes within line of sight service areas of existing and soon to be launched wireless cable systems is between 18 and 20 million.

In HBO's view, the primary reason for this considerable increase in growth is that wireless cable is a low-cost provider of entertainment services to households. HBO believes that wireless cable should remain competitive with existing and new technologies if it continues to provide low-cost services to consumers.

b. Local Multipoint Distribution Service (LMDS)

There is currently one experimental LMDS provider in the country, CellularVision of New York. CellularVision has been marketing a programming package in the Brighton Beach section of Brooklyn, New York, and has attracted backing from Bell Atlantic, Philips Electronics North America Corp., and J.P. Morgan Investment Management.⁶

⁴ Tom Kerver, "The Dawn of Competition," CableVision, May 23, 1994, at 88.

⁵ Id., at 90.

⁶ Id.

At present, the FCC is engaged in a negotiated rulemaking process to establish technical rules for shared use of the 28 GHz spectrum by satellite service providers and LMDS.⁷ In its comments in that proceeding, HBO stated its belief that the 28 GHz spectrum can be shared with appropriate technical conditions. In addition, HBO stressed that the sharing of the 28 GHz band between satellite service providers and LMDS would provide alternative means of distributing video programming. This could result in increased competition at the local distribution level. However, since there are technology and spectrum issues that have yet to be resolved by the Commission, it is difficult to predict the exact effect LMDS will have upon local programming distribution competition.

2. Direct-to-Home Satellite Service

a. Medium-Power Ku-Band

Currently, there is one provider of medium-power Ku-Band DTH service, PRIMESTAR Partners L.P. ("PRIMESTAR"). HBO understands that PRIMESTAR presently uses one medium-power Ku-Band satellite and recently has secured \$565 million in bank financing to obtain capacity on two new satellites.⁸ To date, PRIMESTAR serves

⁷ In the Matter of Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Band and to Establish Rules and Policies for Local Multipoint Distribution Service, Second Notice of Proposed Rulemaking, CC Docket No. 92-297, FCC 94-12 (rel. February 11, 1994); See also, 59 Fed. Reg. 7961 (February 17, 1994).

⁸ John M. Higgins, "EchoStar Aggressively Pursues 1995 DBS Launch; EchoStar Communications Corp.; Direct Broadcast Satellite TV," Multichannel News, March 28, 1994.

approximately 70,000 subscribers nationwide.⁹ Once it fully deploys digital compression technology, PRIMESTAR will be able to greatly expand its channel capacity to between 60 and 80 channels by the end of this year and will have many more attractive programming services to offer consumers.¹⁰

b. High-Power DBS

There currently are two high-power direct broadcast satellite ("DBS") providers, DirecTv, a subsidiary of Hughes Communications, Inc. ("Hughes"), and United States Satellite Broadcasting Company ("USSB"), that share one satellite that was launched late last year. DirecTv and USSB share a common technology permitting consumers to use one decoder and purchase programming from either package. Hughes is planning to launch an additional satellite for DirecTv's exclusive use later this summer. Both DirecTv and USSB began marketing their services in a limited fashion this month. DirecTv estimates that it will have 10 million subscribers by the year 2000.¹¹ There are also various other companies that hold DBS permits, and at least one, EchoStar, recently announced that it

⁹ Kerver, supra, at 86.

¹⁰ Id.

¹¹ Id., at 84. HBO estimates that more than 10,000 retail outlets will be selling DirecTv/USSB equipment by next year. HBO also estimates that 600,000 reception units will be made this year, and by late this year, the equipment vendor will be capable of producing 100,000 units per month. A second manufacturing source will enter the business in 1995 providing even larger production/distribution capacity.

had successfully completed a \$335 million debt placement to launch two DBS satellites within the next two years.¹²

c. C-Band DTH

There has been significant growth in the demand over the last decade for C-Band Home Satellite Dishes ("HSDs") as demonstrated by the increase in the number of installed and shipped HSDs, and the number of authorized subscribers. Specifically, there were only 5,350 installed HSDs in 1980 as compared with 3,623,460 by the end of 1993.¹³ HBO estimates that there will be more than 4 million installed HSDs by the end of 1994. Shipment figures also have increased dramatically. While only 5,350 units were shipped in 1980, 322,605 units were shipped in 1993.¹⁴ To date 148,000 units have been shipped in 1994. HSDs are now located throughout the United States, with the majority located in California, Florida, Illinois, Indiana, Michigan, Missouri, New York, North Carolina, Ohio, Pennsylvania, Tennessee, and Texas.¹⁵ Subscriber growth also has been accelerating at a rapid pace. There were 1.6 million authorized HSD subscribers in 1993, a 60% increase from

12 "SEC OKs EchoStar Offer," Satellite Business News, June 15, 1994, at 4; EchoStar Communications Corporation Prospectus, SEC Form S-1, May 31, 1994, at 33.

13 "Satellite Business Data Bank," Satellite Business News, Feb. 9, 1994, at 24.

14 "Satellite System Sales," Satellite Business News, Jan. 12, 1994, at 1.

15 Satellite Broadcasting and Communications Association, "Facts at a Glance," (1993).

1992.¹⁶ HBO estimates that there will be more than 2 million authorized subscribers by the end of 1994, and more than 2.5 million by the end of 1995.

3. SMATV

One leading industry source estimates that SMATV subscribers grew from 920,000 in 1992 to 953,000 in 1993, representing a 3.5% increase.¹⁷ As of mid 1994, HBO estimates that there are slightly more than 1 million SMATV residential units passed, served by more than 5,000 individual SMATV systems. Projections indicate that SMATV subscriptions will increase to more than 2.2 million by the end of 1995.¹⁸

4. Local Exchange Carriers

Competition in video programming distribution by LECs is under way through two mechanisms -- video dialtone services under the FCC's video dialtone policies¹⁹ and more traditional cable services offered by LECs in areas where the courts have determined that such service is permissible.²⁰ As of now, the Commission has granted five LEC

¹⁶ This data is supplied by GI Corporation which operates the DTH authorization center in California.

¹⁷ Paul Kagan Associates, Inc. Marketing New Media, April 8, 1994, at 4.

¹⁸ Id.

¹⁹ Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 7 FCC Rcd 5781 (1992).

²⁰ Two federal district courts, one in Virginia and one in the State of Washington, have ruled that the provisions of 47 U.S.C. § 533(b) prohibiting LECs from engaging in cable television services in their service areas are unconstitutional. These courts have made it possible for Bell Atlantic and U.S. West to provide cable service in direct competition with cable operators in their territories.

applications for technical and market trials of video dialtone.²¹ An additional 23 applications by LECs to provide video dialtone services are pending at the FCC.

5. Cable Overbuilds

According to the FCC, there are approximately 46 cable systems that meet the definition of an overbuild system.²²

6. Over-The-Air Television

Over-the-air television continues to be the most popular method of video programming distribution in the country. As of today, the three major commercial television network affiliates account for 62% of the prime time audience and 54% of the overall audience for television programming. A fourth network, Fox Television, accounts for an additional 11% and 9%, respectively, of the prime time and overall television audience, and independent stations account for 9% and 10% of such viewing categories.²³ Two major entertainment companies, Time Warner Entertainment Company, L.P. and Paramount Communications, Inc. have announced plans to start new broadcast networks.

²¹ See, Chesapeake and Potomac Telephone Company of Virginia, 8 FCC Rcd 2313 (1993); New York Telephone Co., 8 FCC Rcd 4325; U.S. West Communications, Inc., 9 FCC Rcd 184 (1993); Southern New England Telephone Co., 9 FCC Rcd 1019 (1993); Rochester Telephone Co., 11 FCC Rcd 2285 (1994).

²² Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, Appendix E (1993).

²³ Nielsen Cable Activity Report, First Quarter 1994, 1/3/94 - 3/27/94.

After several years of declining audience shares, the three major networks showed an increase in shares for the just ended television season.²⁴ Thus, over-the-air broadcasting still dominates the programming distribution marketplace.

Other important sources of video programming distribution are home video and pay-per-view. Home video has penetrated approximately 72.2 million homes. That number is expected to rise an average of 4.2 percent per year to reach 88.5 million homes by 1997.²⁵ The pay-per-view industry is currently growing at a yearly pace of about 5 percent, or 1.1 million new subscribers per year. The pay-per-view industry projects that it will penetrate almost 22 million cable homes by the end of 1994.²⁶

B. Increased Access to Video Programming

Not only has the number of competitors to cable increased, but these competitors have no difficulty obtaining top programming from video programming vendors such as HBO. In HBO's experience, cable competitors' access to video programming is comparable to that of cable operators. In fact, it is in the best interests of HBO and presumably other video programming vendors as well, to deal with a multitude of distributors so that their programming is available as widely as possible. To demonstrate HBO's commitment to widespread

²⁴ Nielson Meter Ratings, Mon.-Sat. 8-11 p.m., Sun. 7-11 p.m., 9/20/93 - 4/17/94 and 9/21/92 - 4/18/93.

²⁵ Home Video Continues as Studios' Unsung Hero - Veronis Suhler, " Video Week, Aug. 2, 1993.

²⁶ Jim Cooper, "Waiting for Technological Godot: Industry Is Primed To Capitalize on Compressed, Multichannel Universe; Special Section: Pay Per View/Video on Demand," Broadcasting & Cable, Nov. 29, 1993.

distribution of its services, there follows a description of the practices HBO has followed for several years with respect to competitive distribution technologies.

1. Wireless Cable

From the inception of wireless cable technology, HBO has used such facilities to distribute its services. As early as the mid-1970s, HBO was using the only wireless cable technology that was then available, single channel MDS, to distribute its programming to subscribers in such major markets as New York and Philadelphia. In New York City, HBO's MDS distribution has competed with HBO's sister company, Manhattan Cable TV, which distributes HBO services via cable to portions of Manhattan. HBO continues to widely distribute its video programming via wireless cable operators, and believes that other video programming vendors are doing the same. HBO currently is distributed by more than 35 wireless cable operators in more than 60 different wireless cable systems. The total number of customers that receive HBO and Cinemax through wireless cable systems exceeds 250,000.

In determining whether to distribute its product through a potential wireless cable operator, HBO reviews the prospective wireless affiliate's business plan to determine its financial and technical viability. Once it believes that the company is viable, HBO will seek to enter into an arrangement with that distributor.

With respect to LMDS, HBO has been engaged in ongoing discussions with the principals of CellularVision of New York (the only existing LMDS provider) to evaluate the feasibility of entering into an affiliation agreement with CellularVision. HBO's major concern at

this point is to ensure that the technology employed by Cellular-Vision will provide adequate security for HBO's services. Cellular-Vision has retained an outside company to conduct a technical study that will discuss the security aspects of the New York system. Once this information is received, HBO will resume discussions with CellularVision regarding affiliation.

2. Direct-to-Home Satellite Service

HBO was the first company in the United States to sell satellite programming directly to consumers (DTH) when it commenced scrambling of its signals on January 15, 1986. Since that time, HBO has pursued C-Band DTH technology aggressively as a programming distribution alternative. Over the last several years, HBO has affiliated with an increasingly large number of distributors and equipment dealers. Today, in addition to marketing its services directly to C-Band DTH consumers, HBO has distribution agreements with 21 national C-Band DTH program packagers and it uses more than 3,000 satellite equipment dealers to market its services.

With respect to medium-power Ku-Band DTH, HBO's services are distributed by PRIMESTAR, currently the only medium-power DTH provider. As of June 14, 1994, HBO services were being distributed to approximately 21,000 subscribers through PRIMESTAR. Finally, HBO has entered into an affiliation agreement with USSB to distribute its video programming services over USSB's high-power DBS channels.²⁷

²⁷ As part of this agreement, HBO has granted USSB limited exclusivity to distribute its services. HBO believes that this exclusivity is permissible and justified, although certain parties have challenged the exclusivity agreement in connection with the reconsideration of the Commission's First
Continued on following page

3. SMATV

HBO serves SMATV subscribers in the following three ways:

(1) directly through large regional SMATV operators; (2) through national distributors who sublicense the services to SMATV operators; and (3) through local cable television affiliates that sublicense to SMATV systems in their service areas. Through these three mechanisms, HBO estimates that its services are available to approximately 400,000 basic subscribers, of which more than 100,000 subscribe to HBO's services.

4. Local Exchange Carriers

Although LECs are just beginning to provide transmission of video services through video dialtone experiments, HBO services already are being distributed over the Southern New England Telephone video dialtone test in West Hartford, Connecticut. The distributor in West Hartford is CAI Wireless, which is also a wireless cable distributor of HBO's services. HBO also is involved in discussions regarding program distribution with Bell Atlantic Video Services, Pacific Telesis Video Services and NYNEX, and with Future Vision and Interface Communications, which are or will be program packagers for video dialtone experiments. HBO anticipates distributing its

Continued from previous page

Report and Order in the "Program Access" proceeding, 8 FCC Rcd 3359 (1993). Since the Commission has indicated that it wishes to keep this proceeding limited in scope and to avoid issues from other ongoing Commission proceedings that could affect competition, HBO has not reiterated here the issues pertaining to USSB's exclusivity which are under consideration in the "Program Access" proceeding. See Notice at ¶ 11.

programming through other video dialtone systems as they become operational.

5. Cable Overbuilds

HBO's policy has been to deal with multiple cable systems serving the same franchise area. HBO is unaware of any instance of having turned down a cable overbuilder who has requested an affiliation.

6. Over-the-Air Television

HBO services are not distributed via over-the-air television broadcast and subscription stations because HBO does not have the requisite rights to do so from its program licensors. In any event, there currently are no operating subscription television ("STV") stations.²⁸

7. Technological Advances

At Paragraphs 52-54 of the Notice, the Commission seeks comments on technological advancements that may have a "significant impact on the marketplace." In HBO's view, the single most important technology for the success of any wireless distribution system, be it satellite or terrestrial based, is a secure encryption system. The improvements in encryption technology that have occurred over the past few years through the efforts of programmers, distributors and manufacturers, have paved the way for C-Band DTH and now DBS.

Another important technology to the development of DBS has been digital video compression, which has the capability of expanding the

²⁸ HBO does license some of its original programming on an individual basis to television broadcast networks and stations. HBO also distributes some programs via home video distributors for sale or rental to the public nationally.

capacity of a 16 channel DBS satellite to handle upwards of 80 channels. HBO believes that digital video compression also will be available to the wireless cable industry on a large scale basis over the next two years. This, in turn, will vastly improve the competitive posture of wireless cable operators.

Terrestrial broadcasters likewise are considering the use of digital video compression so that they may provide multiple channels of programming or additional services if permitted as part of their conversion to high definition television ("HDTV") channels.²⁹ In any event, digital compression technology has made it much easier and more spectrum efficient to implement HDTV, by broadcasters, cable operators and other video programming distributors.

Finally, digital compression technology reduces the cost of every new programmer (by making distribution costs lower) since less satellite capacity is required than with analog distribution. Similarly, it is more economical for existing programmers to add new services or service enhancements (such as multiplexing, additional audio channels, etc.).

8. Distribution Practices

HBO's practices have been to deal with all competitive distribution technologies. Basically, HBO makes individual decisions regarding all of its distributors based on normal business considerations (e.g., credit worthiness, motivation and ability to market HBO's services aggressively, capability of the distributor's

²⁹ Geoffrey Faisie, Multiple Messages on Multicasting at MSTV," Broadcasting & Cable, April 4, 1994, at 40.

technology to deliver a high quality signal in a secure environment, etc.).

9. Result of Increased Distributor Competition
on HBO Distribution

As HBO indicated earlier in these Comments, its primary motivation is to maximize the number of subscribers to the HBO programming services. In general, HBO has found that increased competition among video programming distributors improves the penetration of HBO services in the marketplace. For example, in Riverside, California, there has been a 43% increase in HBO subscription units since the introduction of wireless cable in that market 3 years ago. Likewise, in Tucson, Arizona, HBO subscription units have increased by 21% in the 3 years since wireless cable commenced operation there. In Las Vegas, Nevada, there has been an increase in HBO units of 23% since wireless cable was introduced into that market 2 years ago.

HBO also has found that the C-Band DTH distributors do well in head-to-head competition in cable franchising areas. According to research conducted by the SBCA, 66 percent of C-Band HSD owners reside in cable areas.

Although the distribution of HBO services over PRIMESTAR's medium-power Ku-Band DTH facilities has just commenced, HBO already has acquired 21,000 new subscription units via PRIMESTAR, and it expects that number to grow to at least 40,000 by the end of this year. Going forward, HBO estimates its services will penetrate 30% to 35% of the PRIMESTAR base. HBO estimates even greater penetration levels via USSB's high-power DBS system.

III. CHANGES IN PRACTICES/CONDUCT

In Section V of the Notice, the Commission requests information to determine whether the adoption of the program access provisions of the 1992 Cable Act, and the Commission's rules thereunder, have altered the practices of vertically integrated programmers such as HBO with respect to their use of non-cable technologies and their dealings with multichannel distribution competitors.

HBO submits that the information it has supplied in the preceding paragraphs of these Comments demonstrates its business motivation and its practice of distributing its services via every available distribution technology that can provide quality service and reliable security. In fact, HBO was at the forefront in using alternative technologies long before the passage of the 1992 Cable Act. As noted above, HBO's use of wireless cable began in the 1970s; HBO was a pioneer in developing C-Band encryption technology to enable secure distribution via C-Band DTH facilities in the mid-1980s; and HBO affiliated with USSB for high-power DBS distribution in late 1992, pursuant to discussions that preceded the 1992 Cable Act and the FCC's program access rules.

HBO's practices with respect to competitive technologies have continued since the adoption of the 1992 Cable Act. As new wireless cable and other distributors have come forward, HBO has dealt with them pursuant to its standard business practices and in full compliance with the 1992 Cable Act and the Commission's rules.

IV. FUTURE DATA COLLECTION

Under Section 19(g) of the 1992 Cable Act, the Commission is required to report annually to Congress on the status of competition in the video delivery marketplace. The Commission is using the Notice of Inquiry process to collect data for its first report, but in Section VI of the Notice, the Commission asks for comments on appropriate data collection mechanisms that could be used to gather information for future reports.

The Commission recognizes (at Paragraph 81 of the Notice) that there may be a legal issue regarding the Commission's authority to impose periodic reporting requirements on various entities, including vertically integrated programmers such as HBO. HBO submits that the Commission does not have jurisdiction under the 1992 Cable Act to require programming distributors to file periodic reports, in the absence of allegations that the programmers have violated the program access sections.

Section 19(f)(2) of the 1992 Cable Act directs the Commission to prescribe regulations that "establish procedures for the Commission to collect such data, including the right to obtain copies of all contracts and documents reflecting arrangements and understandings alleged to violate this section, as the Commission requires to carry out this section."³⁰ Section 19 prohibits a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor from engaging in unfair methods of competition or unfair or deceptive

³⁰ 47 U.S.C. § 548(f)(2).

acts or practices that hinder or prevent any multichannel video programming distributor from providing satellite programming to subscribers or consumers.³¹ In addition, the FCC is instructed to delineate particular conduct that would constitute an unfair or deceptive act or practice prohibited by Section 19.

Read in context, HBO submits that Section 19(f)(2) enables the FCC to collect information from programmers only with respect to particular instances of alleged violations of the program access provisions. It does not confer broad jurisdiction upon the FCC to adopt annual reporting requirements for cable programming vendors regarding competition among video programming distributors.

Section 3(g) of the 1992 Cable Act is equally inadequate to accord the FCC jurisdiction to establish annual reporting requirements for cable programming vendors. Section 3(g) provides that "the Commission shall, by regulation, require cable operators to file with the Commission or a franchising authority . . . such financial information as may be needed for purposes of administering and enforcing this section."³² Section 3 is concerned with the regulation of rates for the basic cable service provided by cable operators to their subscribers or consumers. This provision, therefore, has no applicability to video programming vendors; it only gives authority to the FCC to obtain relevant financial information from cable operators. Thus, the FCC does not have jurisdiction under this provision to require video programming vendors to annually

³¹ 47 U.S.C. § 548(b).

³² 47 U.S.C. § 543(g) (emphasis supplied).

furnish general information to the FCC regarding competition in the cable industry.

If the Commission concludes, nevertheless, that it possesses the authority to require programmers periodically to supply data outside of a program access complaint proceeding, the Commission should establish procedures to ensure the confidentiality of such information on whatever basis it is collected.

V. CONCLUSION

In light of the foregoing, HBO submits that the Commission should report to Congress that competition among multichannel video programming distributors is thriving and that such competition is expected to continue and increase even more rapidly in the future.

Respectfully submitted,

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